

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of:  
Veronica V.**

**OAH No. L 2006020603**

**Claimant,**

**vs.**

**HARBOR REGIONAL CENTER,**

**Service Agency.**

**DECISION**

This matter was heard by Administrative Law Judge (ALJ) Sandra L. Hitt, Office of Administrative Hearings, on April 9, 10, and 11, 2007, in Torrance, California. Jeffrey D. Farrow, Attorney at Law, represented Harbor Regional Center. Katie Baca, Attorney at Law, represented Veronica V. (Claimant).<sup>1</sup>

Service Agency submitted Exhibits HRC 1-5 and A-Z. Claimant submitted Exhibits 1 through 21. These documents were admitted into evidence by stipulation of the parties. The evidence was received and the matter was argued on April 9, 10, and 11, 2007. The parties submitted closing briefs on April 30, 2007. However, one of the briefs was not legible and had to be resubmitted. That brief was received on May 7, 2007. Claimant's closing brief was marked as Exhibit 22; Service Agency's closing brief was marked as Exhibit AA. The record was closed, and the case was submitted for decision on May 7, 2007.

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<sup>1</sup> Claimant's surname, and that of her family members, is omitted throughout this Decision to protect Claimant's privacy.

## ISSUE

The issue presented for hearing is whether Claimant is eligible for services from Harbor Regional Center based on a diagnosis of Autism and/or a “Fifth Category” classification.<sup>2</sup>

## FACTUAL FINDINGS

1. On February 6, 2007, June Jackson, County Social Worker and authorized representative for Claimant, filed a Fair Hearing Request (FHR) for Claimant, to determine Claimant’s eligibility for services from Service Agency. This hearing ensued.

2. Claimant is 19 years old (DOB: 9/20/87). Claimant was detained from her mother and taken into the custody of the Department of Children and Family Services (DCFS) on July 14, 1993, when she was five years and eleven months of age, due to neglect and filthy, unsanitary, conditions. Since then, Claimant has been institutionalized in facilities for mentally ill children. Claimant’s history includes two failed foster placements and placements at the Maryvale and Harbor View facilities.<sup>3</sup> Claimant is “genetically loaded” for mental illness. Her biological mother is low functioning and has been diagnosed with schizoaffective disorder. Her biological father was diagnosed with schizophrenia. Additionally, Claimant had four maternal relatives with bi-polar disorder (Ex. T, Ex. Y). Her great grandfather committed suicide in a Chicago state hospital by jumping off the roof (Ex. T, Ex. V). A person with a close relative who is schizophrenic is 10 times more likely to have mental illness than the general population (testimony of Dr. John T. Stephenson). Claimant was found eligible for special education on the basis of emotional disturbance (Ex. 7, Ex. 9). She presents with a complex diagnostic condition. She has, at various times, been diagnosed with Autism, Aspergers Disorder, Schizoaffective Disorder, Bi-polar Disorder, Attention-Deficit- Hyper-Activity Disorder (ADHD), Neglect, Sexual Abuse of Child, Psychotic Disorder, Major Depression with Psychotic Features, Post-Traumatic Stress Disorder (PTSD), Overanxious Disorder of Childhood, Anxiety Disorder, NOS, Schizotypal Personality Disorder Features, Borderline Personality Disorder Features, Dissociative Disorder, Dysthymia, and Developmental Delay (Ex. 11, Ex. U, Ex. Y). She has been treated with various psychotropic drugs with varying degrees of success (Ex. V).

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<sup>2</sup> The term “Fifth Category” is commonly used to reference developmental disabilities closely related to mental retardation or requiring treatment similar to that required by individuals with mental retardation.

<sup>3</sup> The Maryvale and Harbor View facilities are residential institutions for children with diagnoses of emotional disturbance. Harbor View is a level 14 facility, which includes a locked facility. Level 14 is the highest level facility in which emotionally disturbed children are placed; level 14 is reserved for severely disturbed children. Claimant was transferred from the Maryvale facility to Harbor View in or around 2003, due to the progression of her mental illness and a steady deterioration of her overall functioning (Ex. T).

3. At age 13, Claimant disclosed that she had been sexually abused by her mother's boyfriend, "Andy," and one of his male friends, from the time she was three until she was removed from the home at age five. At or before this time, she also disclosed that she had been physically abused by both her mother and her mother's boyfriend (Ex. V). It was around this age (13) that Claimant's IQ scores, which had been in the average to low-average range, plummeted to the low-average to borderline range (Ex. V, Testimony of Dr. Stephenson). When Claimant was 12 years of age, her verbal IQ score on the WISC III was 93, her performance IQ score was 108, and her Full Scale IQ score (FSIQ) was 100 (Ex. V). At age 14, Claimant's teachers noted that she was able to complete her math and writing assignments with 80 percent accuracy when she was on-task, but that Claimant's behavioral issues were interfering and she was making little or no progress (Ex. 8). At age 15, her verbal IQ score on the WISC III was 76, her performance IQ score was 79, and her FSIQ was 76 (Ex. V).<sup>4</sup> Although Claimant's expert, Dr. Kaler, explains this drop in FSIQ by stating that Claimant hit a "cognitive ceiling," she admits that a variation of more than 15 points is unusual. A drop of 24 IQ points is better explained by a psychiatric disorder (Ex. 13, Testimony of Dr. Stephenson).

4. Evidence supports Dr. Stephenson's opinion that Claimant's IQ is higher than recent measurements indicate. Claimant was functioning at or near grade level in the 9th grade at Maryvale, with reading scores at the 8th grade level and math skills at the 7<sup>th</sup> grade level (Ex. U). Claimant read Hamlet in 11<sup>th</sup> grade English literature class and now reads for pleasure at a 9th grade level or better. She reads adult romance novels, and fantasy novels such as Aragon and Harry Potter (Ex. 14, Ex. 19, Ex. U, Testimony of Ashley Levin, MSW, Meghan Brachovitch, MSW, and Dr. Weinraub.). Several of the examiners who evaluated Claimant noted that it was difficult to test Claimant's IQ, because she would become frustrated if she did not know the answer to a question immediately, and skip over it rather than spend time thinking about it. She was also easily distracted, became easily bored and refused to do parts of the tests; she would put her head down on the desk to go to sleep during the test, or leave the testing room altogether (Ex. 19, Testimony of Dr. Stephenson). This is the same type of behavior Claimant had been demonstrating in school at Harbor View for the past several years: not participating, putting her head down to go to sleep in class, or refusing to attend class outright, because it was "boring." (Testimony of Victoria Tellez, Social Work Investigator for the Children's Law Center). Claimant did not meet her goals for 10th and 11th grade, and was failing her classes, due to poor attendance, incomplete assignments and behavior problems (Ex. P, Ex. T.). It is therefore likely that Claimant's true IQ score is higher than her test scores (Ex. U, Testimony of Dr. Stephenson).

5. Claimant has a history of bizarre thought processes and visual and auditory hallucinations. She reported having visual illusions at night, and hearing voices calling her name (Ex. V). She was also reported to believe she can fly "like Peter Pan" and that she can communicate with stuffed animals and dogs, and sometimes exhibited animal-

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<sup>4</sup> Claimant had FSIQ scores of 93 and 92, respectively at ages eight and ten.

like behavior, such as barking (Ex. I, Ex. T, Ex U, Ex. V). On one occasion, while Claimant was at Maryvale, she became hysterical watching trees blowing in the wind outside her window at night. She thought the trees were coming to kill her (Ex. V). She also reported, on at least one occasion, that a man was following her and trying to kill her, that she had a “stalker,” and that other people could “read her thoughts” (Ex. V). Claimant also has a history of aggressive and bizarre behavior including urinating in the shampoo, cruelty to animals, fascination with fire, burning another child’s dental retainer, trying to flush another child’s teddy bear down the toilet, stabbing a fellow resident with a pen, spitting, kicking, hitting, and throwing things, and destroying property (Ex. V). She was not accepted for residence in at least one adult DMH facility because of her aggression (Testimony of Ashley Levin, MSW, Claimant’s former therapist at Harbor View).

6. Because Claimant’s representatives could not find a place for her in an adult DMH facility, at the age of 19, she was released to live at home with her mother, with services provided by Therapeutic Behavioral Services (TBS). Ms Brachovitch, a TBS team leader, testified that claimant is receiving visits from TBS two to four times a week. Claimant’s TBS program is designed to increase her self-care skills. TBS was working with Claimant on simple, repetitive items, such as brushing teeth, taking a shower, cleaning the tub, taking out the trash, and washing the dishes. At first, Claimant was willing to work with TBS, but the situation soon deteriorated. Now Claimant refuses to cooperate with TBS. She engages in tantrums and other defiance behaviors, and is not willing to participate in the TBS program. Ms. Brachovitch testified that Claimant is not benefiting from the TBS program, and that the only reason to continue the program is because “they are the only services she is getting.” Ms. Brachovitch believes that Claimant’s mother is not able to care for her properly; the house they live in is dirty and has cockroaches. Mother is low functioning and does not follow through with TBS instructions. Ms. Brachovitch also opined that Claimant would not survive in an adult DMH facility. For her part Claimant reported that she is “happy to be home” with her mother and is thrilled to have her own bedroom (Ex. Y, Testimony of Dr. Michael Roy Weinraub).<sup>5</sup> Claimant’s mother reported, on different occasions, that “things were going good” and, alternatively, that it was “a struggle” (with Claimant at home) (Ex. Y, Testimony of Dr. Stephenson). Claimant needs structure and supervision. She is not capable of living on her own and is not economically independent (Ex. V, Testimony of Ms. Brachovitch).

7. Claimant may also be “genetically loaded” for a developmental disability. Claimant’s parents may have been developmentally disabled as well as mentally ill. Dr. Weinraub testified credibly and convincingly that he believes Claimant has Fragile-X syndrome. Dr. Weinraub is a Board certified pediatrician. He is employed by the Department of Mental Health (DMH); part of his job is to identify biological

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<sup>5</sup> Claimant’s desire to reunite with her mother was a persistent theme during her institutionalization. At one point, she jumped from the top of a closet and broke her pelvis, so that she would be taken to the hospital, because she had heard that her mother was in the hospital (Ex. 16).

causes of mental illness. He first became aware of Claimant when Dr. Malkin asked him to “take a look” at her. Dr. Malkin, a psychiatrist, described Claimant as a “funny looking kid” (FLK). FLK is a term used by medical professionals to describe children who have dysmorphic features. Dysmorphic features can be a sign of genetic or hormonal problems. Dr. Weinraub observed Claimant to be small for her age--about five feet, four inches tall, and 106 pounds. She has an unusually long face and large ears, and a protruding, unusual jaw. Approximately two to six percent of autistic patients have Fragile-X Syndrome, and one-third of all people with Fragile-X have a diagnosis in the Autistic-Aspergers Spectrum. Dr. Weinraub ordered genetic testing for Claimant. The testing has not yet been done; the request is processing through the system. Dr. Weinraub believes that there is a strong probability that Claimant has been misdiagnosed during her years in the dependency system, and has been misunderstood and poorly served for a long time. Dr. Weinraub did not offer a definite diagnosis of Respondent’s condition pending the results of genetic testing. According to Dr. Weinraub, dual diagnoses (mental illness and developmental disability) are not uncommon.

8. Claimant has many autistic-like traits: She presents as a child much younger than her years and often (but not always) has a “flat effect.” She isolates herself socially, preferring to read, sleep<sup>6</sup> or watch television or videos. She is sensitive to loud noises, and may have tactile sensitivities (she does not like to take a shower and is a picky eater--she will be hungry but not eat because she does not like the meal) (Ex. 11 and testimony of Dr. Weinraub). She has an awkward gait, and is somewhat stoop shouldered; she does not stand or walk completely erect (Ex. 13, and testimony of Dr. Weinraub). She has an awkward pencil grip (Ex. 11), and her fine motor skills are impaired (Ex. 19). She is significantly delayed in adaptive functioning: she needs prompts to take a shower, brush her teeth, or comb her hair (Ex. 19 and testimony of Meghan Brachovitch). She has severely delayed visual motor integration (Ex. 19). She has a history of “mouthing” things--chewing on paper and tape (Ex. I). She frequently tantrums when frustrated and has engaged in self-injurious behaviors such as throwing herself on the floor and banging her head against the wall (Ex. V).

9. Despite at least nine evaluations by various physicians and psychologists over the years, Claimant was not diagnosed with autism until October of 2003, when Claimant was 16 years old and her care givers were pursuing alternative housing for her in anticipation of her eighteenth birthday and emancipation from the child dependency system (Ex. 13, Ex. Y). At that time, Claimant was referred to Lisa Abrams, Ph.D., for assessment. Dr. Abrams diagnosed Claimant with autistic disorder opining that Claimant was on the “high end” of the autism spectrum (Ex. 11). Dr. Abrams’ appears to have based her opinion on (among other things) the speculation that Claimant had early language delays because Claimant’s current language functioning is impaired. (Ex. 11 p.8).

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<sup>6</sup> While several reporters indicated that Claimant’s sleeping was an attempt to self-isolate, Claimant’s desire to sleep much of the time was also attributed to medication with very large doses of Depakote. Claimant’s dosage of this drug has recently been significantly reduced.

10. Pegeen Cronin, Ph.D., also diagnosed claimant with autism in September 2005, when claimant was about to turn 18. However, Dr. Cronin did not address the issue of the lack of any evidence of early developmental delay.

11. No evidence was presented at the hearing of any motor or language delays prior to the age of three, although Claimant was diagnosed with language delays when she was five years old. Nor was any evidence of early developmental delay available for review by Sandra Kaler, Ph.D., when she performed her evaluation of Claimant in 2006. Dr. Kaler believes that Claimant has autism; Dr. Kaler opined that Claimant's presentation "is most consistent with the active but odd subtype of autism, which is often confused with Schizotypal Personality Disorder in persons under 18 years of age." (Ex. 19). However, because there was no evidence of early delays, Claimant did not strictly meet the criteria for autism under the DSM-IV-TR. A diagnosis of autism requires developmental delays prior to the age of three. The diagnoses of autism and Aspergers Disorder are mutually exclusive.<sup>7</sup> On that basis, Dr. Kaler diagnosed Claimant with Aspergers Disorder.

12. Prior to being taken into the custody of DCFS, Claimant lived at home with her mother and her maternal aunt.<sup>8</sup> (Ex. I) Claimant's mother reported that Claimant walked at 11 months, was toilet trained at age 2, and "gravitated to books and liked to be alone." Claimant's mother did not recall any difficulties with Claimant's social adaptation as a toddler (Ex. J). Beginning at age 15 months, Claimant attended daycare at the Little Toots Preschool that was located across the street from the mother's adult education program (Ex. 16, Ex. I); Claimant also attended kindergarten and received daycare under Aid to Families with Dependent Children (AFDC) (Ex. I). Claimant's mother had a babysitter for Claimant in the afternoons (Ex. 16, Ex. I). No explanation was proffered at the hearing as to why an early history was not available from these or other sources, such as medical records.<sup>9</sup>

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<sup>7</sup> Dr. Kaler testified that some experts believe that Aspergers Disorder is a "touch of autism," and that this may be reflected in the next version of the DSM; nevertheless, this is speculation, and at present, the DSM-IV-TR definition of Aspergers Disorder precludes a diagnosis of autism.

<sup>8</sup> There was some indication that the maternal aunt is either bi-polar, or developmentally disabled, or both, and that Claimant's aunt, as well as Claimant's mother, may not be a reliable reporter (Ex. V).

<sup>9</sup> Claimant argued that no history was available prior to Claimant's being taken into DCFS custody in 1993. However, this is not the case. There were some medical records from the hospital where Claimant was born (Ex. U). There was also some indication that Claimant had a history of ear infections and pain in her ears up to age three (Ex. I, Ex. V). It is understood that over 15 years have passed since Claimant's early childhood; nevertheless, there was nothing offered at hearing to demonstrate that a reasonable effort to obtain records from Claimant's early childhood had been made.

## LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Act (Lanterman Act) governs this case. (Welf. and Inst. Code §§ 4500 et seq.) Claimant properly and timely presented a fair hearing request and otherwise established jurisdiction for this case (Factual Finding 1).

2. When an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on the claimant. (*Lindsay v. San Diego Retirement Board* (1964) 231 Cal. App. 2d 156, 161 (disability benefits); *Greator v. Board of Admin.* (1949) (retirement benefits)). In this matter, Claimant must prove, by a preponderance of the evidence, that she is eligible for Regional Center services under a diagnosis of either autism, or the Fifth category.

3. The Lanterman Act is a comprehensive statutory scheme designed to provide supports and services for persons with developmental disabilities. The Act has a two-fold purpose: (1) to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community; and (2) to enable developmentally disabled persons to approximate the pattern of living of non-disabled persons of the same age and to lead more independent and productive lives in the community. (Welf. & Inst. Code, §§ 4501, 4509, 4685, 4750, 4751; see generally *Association for Retarded Persons v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) The Department of Developmental Services (DDS) is the state agency required to implement the Lanterman Act. It carries out that responsibility by delivering its services through the various Regional Centers located statewide.

[T]he Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, “has jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons” (Welf. & Inst. Code §4416), while “Regional Centers,” operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with “access to the facilities and services best suited to them throughout their lifetime” (Welf. & Inst. Code §4620). (*Association of Retarded Persons, supra*, at p. 389.)

4. In order for Claimant to be eligible for Regional Center Services under the Lanterman Act, she must present with a “developmental disability” and have a “substantial disability.” (Welf. & Inst. Code §4512.)

5. Section 4512, subdivision (a) of the California Welfare and Institutions Code defines a developmental disability as:

a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined

by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are (1) solely physical in nature. . .

6. Section 4512, subdivision (1) of the Welfare and Institutions Code provides in pertinent part:

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self Care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

7. Although Claimant presents with many symptoms of Autism, there was no mention of this diagnosis until Claimant was approaching emancipation from the child dependency system, despite nine different evaluations by the physicians and psychologists under whose direct care she has been since she was placed in care with DCFS almost 13 years ago (Finding 9). Claimant has offered some evidence that could support a diagnosis of autism (Findings 7 and 8); however, she has not made a sufficiently strong showing to meet her burden of proof that she is entitled to Regional Center services on the basis of autism. Although Dr. Levin and Dr. Cronin diagnosed Claimant with autism, both diagnoses lacked the required analysis of early childhood development. Claimant received a clinical diagnosis of Asperger’s Disorder from Dr. Kaler in 2006; under the DSM-IV-TR, Aspergers Disorder and autism are mutually exclusive (Finding 11). A diagnosis of autism requires evidence of developmental delays prior to age three. Such evidence was not presented (Finding 11, Finding 12 fn. 8,). Claimant is not eligible for Regional Center services on the basis of autism at this time.

8. According to the DSM-IV TR, the essential feature of Mental Retardation is significantly sub-average general intellectual functioning that is accompanied by significant limitations in adaptive function in at least two of the following areas: communication, self care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. Claimant’s general intellectual functioning has recently measured in the low-average to



borderline range (Findings 3 and 4). However, as indicated in Finding 4 it is very likely that Claimant's actual IQ is higher than that reflected on recent measurements. Claimant is 19 years of age, and does not function academically at her age level. She has seventh grade math skills and a ninth grade (or possibly higher) reading level (Findings 3 and 4). Nevertheless, Claimant's cognitive ability is higher than expected of an individual with mental retardation. Her low adaptive functioning is better attributed to emotional disturbance than cognitive deficits.

9. Claimant has been treated with various psychotropic drugs, with varying degrees of success (Finding 2). It is unlikely that any one diagnosis would account for all of Claimant's problems, and in fact, she has received multiple diagnoses in the past (Finding 2). From the evidence adduced at hearing, Claimant's condition is best described as a dual-diagnosis: a Pervasive Developmental Disorder, and emotional disturbance (Findings 2, 3, 5, 7, 8 and 11). Like individuals with mental retardation, Claimant can only function in a structured environment (Findings 2 and 6). From the ages of approximately 15 to 19, Claimant attended school in a highly structured special education non-public school setting at Harbor View (Findings 2 and 6). Although this is a very restrictive and supportive setting, Claimant still did not meet her goals for 10th and 11th grade, and was failing her classes (Finding 4). In order to function in the community, Claimant needs a significant amount of support, including prompting and supervision. (Findings 2 and 6). However, the only required "treatment"<sup>10</sup> identified by Claimant that would be similar to that required by mentally retarded individuals is repetitive instruction, broken down into small steps. This evidence is contradicted by the fact that Claimant was performing at or near grade level until adolescence, when the progression of her mental illness resulted in a deterioration of her overall functioning (Ex. T), as well as the fact that she has the ability to perform at a high level in areas that interest her (she reads for pleasure at the 9<sup>th</sup> grade level or better, and has a history of failing to attend school because it "bores" her) (Finding 4). What is more, Claimant is not currently responding to a similar type of treatment provided by TBS (Finding 6). She therefore has not established that she requires treatment similar to that required by a person with mental retardation.

10. Claimant has not met her burden to show that she has a condition closely related to mental retardation or that she requires treatment similar to that required by mentally retarded individuals. Therefore, Claimant is not eligible for Regional Center services on the basis of a "Fifth Category" determination at this time.

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<sup>10</sup> Claimant's expert, Dr. Kaler, opined that Claimant could use a job coach, vocational training, and things of that nature. It is arguable whether these types of services constitute "treatment," and, in any event, they are too generic to support a "Fifth Category" determination.

WHEREFORE, THE FOLLOWING ORDER is hereby made:

**ORDER**

Harbor Regional Center's determination that Claimant is not eligible for services is sustained. The appeal of Claimant Veronica V. from the Service Agency's determination that she is ineligible for Regional Center services is hereby denied.

DATED: May 17, 2007

/s/  
SANDRA L. HITT  
Administrative Law Judge  
Office of Administrative Hearings

**NOTICE**

**This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.**